

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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EBI DETROIT, INC.,

Plaintiff-Appellant,

v

CITY OF DETROIT, and DETROIT WATER &  
SEWERAGE DEPT,

Defendant-Appellees.

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UNPUBLISHED

April 30, 2009

No. 277953

Wayne Circuit Court

LC No. 06-629921-CK

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff, EBI-Detroit, Inc., appeals as of right the order of the trial court dismissing plaintiff's complaint after granting summary disposition in favor of defendants, the city of Detroit ("the city"), and the Detroit Water and Sewerage Department ("DWSD"). On appeal, plaintiff argues that the trial court erred in holding that plaintiff did not have standing, as a taxpayer, to bring a claim against defendants for violation of a city ordinance, in refusing to extend plaintiff the right to civil redress for the violation, and in holding that plaintiff did not have standing where defendant breached a contract that existed between the parties, and where plaintiff had a protected property interest in the evaluation criteria provided by defendants. We affirm.

This dispute arises from defendants' solicitation of bids for two projects involving construction management and services for water system improvements on streets throughout the city. According to plaintiff,<sup>1</sup> its bid for one of the projects was the lowest, and its bid for the other project was second lowest, under the criteria set forth in defendants' requests for proposals ("RFPs"). Plaintiff alleges that defendants altered the evaluation criteria, during the bid process, with the result that plaintiff's bids were listed as fifth lowest for both projects, and DWSD recommended other bidders be awarded the contracts. After approval by the city council, the contracts were awarded to other bidders.

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<sup>1</sup> Because this appeal is from the trial court's dismissal of plaintiff's complaint upon defendants' motion for summary disposition pursuant to MCR 2.116(C)(8), we decide this appeal based on the allegations of the complaint.

Plaintiff's first argument on appeal is that the trial court erred in holding that plaintiff did not have standing to sue, where plaintiff was a city taxpayer, and defendants violated the city ordinance, bidding procedures, and the requirement that it act in good faith. We disagree.

In order to be preserved for appellate review, an issue must generally have been raised before, and addressed by, the trial court. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Because plaintiff did not specifically argue before the trial court that it had standing as a taxpayer, this issue is not preserved. Nevertheless, because it involves a question of law, and the facts necessary for its resolution have been presented, we will address this issue. *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

"A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "When a challenge to a complaint is made, the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Id.* We review a trial court's grant of summary disposition de novo. *Id.* Whether a party has standing is a question of law, which we review de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

The general rule, as established in *Talbot Paving Co v City of Detroit*, 109 Mich 657; 67 NW 979 (1896), is that a "disappointed bidder" does not have a cause of action to recover damages. Citing cases in which Michigan courts have allowed taxpayers to seek injunctive relief where fraud is alleged, plaintiff argues on appeal that it "has the right to insure that the City is conducting its bidding procedures in accordance with law." It is true there is a cause of action for a taxpayer to seek injunctive relief where it alleges fraud, abuse, or illegality in the bidding process. See, e.g., *Berghage v City of Grand Rapids*, 261 Mich 176; 246 NW 55 (1933); *Leavy v City of Jackson*, 247 Mich 447; 226 NW 214 (1929); *Great Lakes Heating, Cooling, Refrigeration & Sheet Metal Corp v Troy School Dist*, 197 Mich App 312, 314; 494 NW2d 863 (1992). However, plaintiff does not seek injunctive relief, and there is no authority for a cause of action for damages in connection with alleged improprieties in the award of public contracts. On the contrary, it has been the rule since *Talbot*, *supra*, that there is not. Therefore, we reject this argument.

Plaintiff's second argument on appeal is that the trial court erred in failing to recognize a cause of action for defendants' alleged violation of a city ordinance. We disagree.

Although plaintiff argued before the trial court that it was entitled to a civil remedy, the trial court did not address this argument. Therefore, this issue is unpreserved. *Brown*, *supra* at 599. But we nevertheless address this issue, because it presents a question of law, and all the necessary facts have been presented. *Detroit Free Press, Inc, v Family Independence Agency*, 258 Mich App 544, 555; 672 NW2d 513 (2003).

Plaintiff argues, by way of analogy to the Michigan Builders' Trust Fund Act ("MBTFA"), MCL 570.151 *et seq.*, that this Court should recognize a right of plaintiff to seek civil redress for defendants' violation of the ordinance "through its unilateral change to the evaluation criteria regarding the Projects." The MBTFA provides, in its entirety:

Sec. 1. In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes. [MCL 570.151.]

Sec. 2. Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefore [sic], of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court. [MCL 570.152.]

Sec. 3. The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud. [MCL 570.153.]

Although the MBTFA is a penal statute, the Michigan Supreme Court has recognized a civil cause of action for violation of the MBTFA. *Livonia Bldg Materials Co v Harrison Const Co*, 276 Mich App 514, 519; 742 NW2d 140 (2007). But this Court has limited such an action to private construction contracts. *DiPonio Const Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 48; 631 NW2d 59 (2001).

Plaintiff claims that this Court should recognize a similar cause of action for defendants' alleged violation of Detroit City Ordinances, and cites Section 18 (Finance and Taxation), Article V (Purchases and Supplies), Divisions 1 (Generally) and 2 (Professional Services Contracts). These provisions set forth the procedures for making major and non-major purchases, and entering into professional services contracts. Significantly, there is no indication that the ordinance was intended to create a private right of action. In addition, "[c]ompetitive bidding is not intended to benefit bidders. It is designed to protect the taxpaying public from fraud or favoritism in the expenditure of government funds for public works projects." *Malan Constr Corp v Bd of Co Rd Comm'rs*, 187 F Supp 937, 939 (ED Mich, 1960), citing, *inter alia*, *Talbot*, *supra* at 657. Therefore, plaintiff has failed to support its argument that this Court should recognize a private right of action to seek redress for alleged violations of the city ordinance. See also *Long v Chelsea Community Hosp*, 219 Mich App 578, 584; 557 NW2d 157 (1996) (finding that the implicit purpose of a statute providing immunity to entities for their actions involving peer review, unless they acted with malice, was to protect participants in the peer review process: "[t]he statute is not designed to provide a scheme of enforcement of the rights and duties it creates for the simple reason that it creates no right of action for malice.").

Finally, plaintiff argues that the trial court erred in holding that plaintiff did not have standing to sue, where defendants breached a contract between the parties, where plaintiff had a protected property interest in the award of the contracts, and where defendants breached a duty to act in good faith. We disagree. Although plaintiff's argument that it had a protected property interest in the outcome of the bidding process is unpreserved, because the trial court did not address it, we nevertheless address the issue, because it presents a question of law, and all the necessary facts have been presented. *Detroit Free Press*, *supra* at 555.

Plaintiff argues that a contract was formed between the parties when plaintiff accepted defendants' "offered evaluation criteria" by submitting its bids, and defendants breached this contract by "unilaterally altering the evaluation criteria after all of the bids were submitted." We disagree. No contract between the parties was formed. An invitation to bid does not constitute an offer, and plaintiff's bids were merely offers, which did not give rise to contractual obligations, because they were not accepted by defendants. 1 Williston, Contracts (4<sup>th</sup> ed), § 4:13.

Plaintiff also raises a due process argument, claiming that it had a protected property interest in the bidding process, or in being awarded the contracts<sup>2</sup> and therefore has standing to contest the change in the bidding rules and the failure to accept its bids. We disagree.

It is axiomatic that in order to claim a deprivation of property without due process, a claimant must first show a property interest or entitlement, created by an independent source (usually state law). See, e.g., *Board of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Perry v Sindermann*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972). In our federal system, the due process clause does not *create* property interests; it merely secures interests, created elsewhere, from deprivation without due process. E.g., *Cine SK8, Inc v Town of Henrietta*, 507 F 3d 778, 784 (CA 2, 2007). In *Cine SK8, Inc*, the United States Court of Appeals recently stated: "Because the U.S. Constitution generally does not create property interests, this court . . . looks to existing rules or understandings that stem from an independent source such as state law to determine whether a claimed property right rises to the level of a right entitled to protection under . . . due process . . . ." *Id.* (internal quotation marks omitted), citing *Bd of Regents of State Colleges*, *supra* at 577. Similarly, and naturally, the parameters and limitations of a property interest are determined by reference to the independent source (again, usually state law). See, e.g., *Cleveland Bd of Ed v Loudermill*, 470 US 532, 538; 105 S Ct 1487; 84 L Ed 2d 494 (1985).

In other words, "[i]n order to have a protected property interest, plaintiff must have a legitimate claim of entitlement from a state law source to award of" the contracts. *City Communications, Inc v City of Detroit*, 650 F Supp 1570, 1581 (ED Mich, 1987). Here, under state law, as we have just concluded, plaintiff did not have a contract with defendants. Therefore, defendants could not have deprived plaintiff of a property right, when they failed to

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<sup>2</sup> Plaintiff's brief does not specify whether its due process claim would be for procedural due process, or substantive due process. Also, below plaintiff did not plead a claim of deprivation of property without due process of law.

award the contracts to plaintiff. Similarly, plaintiff has failed to show that, under an independent source such as Michigan law, plaintiff has a recognized property interest in the existing rules regarding bidding.

In its due process argument, plaintiff cites *United Omaha Life Ins Co v Solomon*, 960 F2d 31 (CA 6, 1992), in support of its argument that it has standing to contest defendants' actions. In *United Omaha Life*, the court stated: "A 'disappointed bidder' to a government contract may establish a legitimate claim of entitlement protected by due process by showing either that it was actually awarded the contract at any procedural stage or that local rules limited the discretion of state officials as to whom the contract should be awarded." *Id.* at 34.

This argument fails. First, plaintiff did not plead a due process claim below. Therefore, even if *United Omaha Life Ins Co* stands for the proposition that plaintiff would have a due process claim in this case, it is irrelevant, since no such claim is brought.

Second, *United Omaha Life Ins Co* does not demonstrate that plaintiff here has standing. Here, plaintiff does not claim that it was awarded the contract at any stage; rather, it claims that the city's rules and guidelines for evaluation of bids limited the discretion of the DWSD with respect to the award of contracts. But plaintiff has no entitlement to the award of the contracts under Michigan law, because, as already discussed, "the law of Michigan gives no rights to unsuccessful bidders." *City Communications, Inc, supra* at 1581. See also *United Omaha Life Ins Co, supra* ("Michigan statutory and case law neither requires that the lowest bidder be awarded a state contract[,] nor creates a property interest in disappointed bidders on state contracts."). Because plaintiff has not demonstrated that it had a protected property interest under an independent source, such as Michigan law, it lacked standing to challenge, on due process grounds, the award of the contracts to other bidders.

Finally, plaintiff argues that it has standing due to the alleged bad faith of defendants in "illegally changing the mandated and customary cost evaluation method in order to prevent EBI-Detroit from being awarded one of the Projects." However, as already discussed, the general rule is that disappointed bidders do not have a cause of action, and plaintiff has failed to cite any authority to support the proposition that a disappointed bidder has a cause of action to challenge the city's alleged failure to act in good faith in awarding the project contracts.

Affirmed. No taxable costs pursuant to MCR 7.219, a question of public policy involved.

/s/ Kurtis T. Wilder  
/s/ Jane E. Markey  
/s/ Michael J. Talbot